

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

PAT.&T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

~~Ex parte~~ MICHEL H. A. GONZE, FREDDY M. L. VAN DER SCHUEREN
and ANDRE L. I. RAPAILLE

Appeal No. 95-3293
Application 07/935,553¹

ON BRIEF

Before KIMLIN, JOHN D. SMITH and OWENS, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 8-12, all the claims remaining in the present application. Claim 8 is illustrative:

8. A process for producing a lozenge containing a sweetener and a binding agent in which the sweetener consists essentially of at least one member of the group consisting of erythritol and maltitol, said process comprising:

¹ Application for patent filed August 26, 1992.

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a. kneading the sweetener at a temperature in the range 35° to 60°C while slowly adding an aqueous solution of the binding agent thereto,

b. kneading the sweetener and the binder into a smooth, _____ homogenous paste,

c. forming the paste into a lozenge, and

d. heating the lozenge at a temperature in the range 40° to 50°C to harden it, the amounts of binder and sweetener in the composition used to make the lozenge being 0.2 to 3.0 and 98.0 to 71.0 % by weight, respectively, together with 1.8 to 26.0% water.

The examiner relies upon the following references as evidence of obviousness:

Guillou et al. (Guillou) 4,097,616 Jun. 27, 1978

Lees et al. (Lees), Sugar Confectionery and Chocolate Manufacture. Leonard Hill, Great Britain, pp. 293-294 (1985)

Appellants' claimed invention is directed to a process for making a lozenge, i.e., a hard candy, and the lozenge so produced. The process entails kneading a sweetener, specifically, either erythritol or maltitol, and a binder into a homogeneous paste, forming the paste into a lozenge, and then heating it at a temperature in the range of 40° to 50°C to harden the lozenge.

Appealed claims 8-12 stand rejected under 35 U.S.C. § 103 as being unpatentable over Guillou in view of Lees.

Upon careful consideration of the opposing arguments presented on appeal, we find that the examiner has failed to establish a prima facie case of obviousness for the claimed

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subject matter. Accordingly, we will not sustain the examiner's rejection of the appealed claims for essentially the reasons expressed by appellants in their principal and reply briefs on appeal.

The basic flaw in the examiner's rejection is that the applied references, Guillou and Lees, when combined, fail to teach or suggest a lozenge containing a sweetener which consists essentially of at least one of erythritol and maltitol. Guillou is directed to making soft, chewable candy, not lozenges, and does not disclose the use of the claimed sweeteners. Lees, while disclosing a process of making lozenges, discloses only icing sugar as a sweetener. Neither reference discloses the claimed sweeteners nor provides the general teaching necessary to support the examiner's reasoning, i.e., the process of making lozenges disclosed by Lees can be employed notwithstanding the specific sweetener utilized. On the other hand, as pointed out by appellants, the present specification discloses that three different sweeteners are not suitable for producing lozenges, viz., commercially available maltitol-containing products in which the maltitol concentration is up to 90% by weight, palatinit, and an hydrogenated starch hydrolysate containing 85% by weight maltitol.

In conclusion, in the absence of any teaching or suggestion in the applied prior art for utilizing a sweetener consisting

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essentially of either erythritol or maltitol in a process of
making lozenges, we are constrained to reverse the examiner's
rejection.

REVERSED

Edward C. Kimlin
EDWARD C. KIMLIN)
Administrative Patent Judge)

John D. Smith
JOHN D. SMITH) BOARD OF PATENT
Administrative Patent Judge)
APPEALS AND
INTERFERENCES)

Terry J. Owens
TERRY J. OWENS)
Administrative Patent Judge)

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